

2008

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Recommended Citation

Rubio, Brett and Baker, Bridget K. (2008) "Are We Targeting Our Fellow Countrymen? The Consequences of the USA PATRIOT Act," *Journal of Educational Controversy*: Vol. 3 : No. 1 , Article 4.
Available at: <http://cedar.wwu.edu/jec/vol3/iss1/4>

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ARTICLE

Are We Targeting Our Fellow Countrymen? The Consequences of the USA PATRIOT Act

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“They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”

- attributed to Benjamin Franklin

Introduction:

Shortly after the attacks of September 11, Congress passed the Patriot Act (2001) without any debates or discussions regarding its effects. This complex legislation was passed without clear and calm understanding about the manner in which this document would shape our nation and our liberties. It is unfortunate that a gulf continues to exist between those who know about the effects of the Patriot Act and those who do not. This paper is not intended to explain the entire Patriot Act. It is a subjective piece meant to highlight only a few of the ways that the Patriot Act has fundamentally reduced our civil liberties, and in doing so encouraged racial profiling and hate crimes. We will show how these trends are particularly destructive to school and university environments. If this paper is successful in its intent, you may share our belief that only by standing up for our rights will they continue to live on.

Redefining the Constitution through a Terrorist Lens:

The Administration and the Congress bypassed careful debate by enacting too quickly legislation that would supposedly insulate the United States against further attack by increasing the ability of law enforcement agencies to conduct search and seizure, institute wire taps without a warrant, and physically detain a person without allowing access to legal representation (Stubbs, 2003-2004). The Patriot Act received Congressional approval within 45 days of the September 11 attacks. With heightened public fear and outrage, and demands for justice, the Patriot Act, offering what was touted as additional protection from the unknown, received little resistance from any members of Congress who might have been concerned about the possibility of unconstitutional legal action (ACLU, 2003).

While privacy is not explicitly guaranteed by the Constitution, it can be implicitly derived from several Constitutional amendments: The First Amendment protects the individual's freedoms of expression, religion and association. The Third Amendment protects the private citizen against the state's harboring military personnel in his or her private residence, and the Fourth Amendment, against unreasonable search and seizure. The Fifth Amendment ensures that individuals cannot be compelled to provide testimony against themselves. The Ninth Amendment reserves “to the people” those rights which are not enumerated in the Constitution. Finally, the Fourteenth Amendment guarantees that no person shall be deprived of life, liberty or property without due process of the law, providing an additional bulwark against government interference in individual privacy (Diffie & Landau, 1998).

The act reduced existing federal limitations, allowing local, state and federal government agencies to conduct surveillance of all forms of electronic communication, financial transaction histories, library and bookstore records, and to seize and search anyone who is suspected of terrorist activities (U. S. Department of Justice, n.d.). Section 206 of the Patriot Act authorizes the government to conduct “roving” wiretaps. These wiretaps are suspect-specific rather than device-specific, which means that

the police or FBI can listen to all phones where the suspect works, shops or visits without separate warrants. Thus, the Patriot Act redefines terrorism in that it also places domestic activities under the umbrella of terrorism (Diffie & Landau). Anyone could be accused of engaging in terrorism if he or she engages in activities which are dangerous to life and violate existing criminal laws. Intimidation and/or coercion of civilians through mass destruction, kidnapping and assassination are all defined as terrorist activities (Zeljak, 2004).

Students engaged in their right to assemble now run the risk of their privacy being invaded. A student's privacy, even if the student is a minor, is no longer protected; private health records, school and library records may be seized if the student is deemed suspicious by local or federal authorities (AAUP, 2003). Involvement in extracurricular activities, such as students affiliated with Green Peace, Planned Parenthood, Right to Life, or more specifically, anti-war organizations, are now easy targets for suspicion. While the Patriot Act does not directly advocate the use of racial profiling and discrimination, it legitimizes and creates a surveillance society in which people hold their neighbors under suspicion. Benjamin Muller (2008) defines the "surveillance state" as an environment in which vulnerability is immanent, and our only source of protection afforded by the national government is to securitize everything.

The Patriot Act is one of many surveillance laws which shape and legitimize this culture of suspicion and paranoia. We live in a culture where we are both the watchers and the watched. The Patriot Act allows our governing institutions to use tactics which question the presence of basic civil liberties and instill the idea that heightened security means fewer individual protections.

This has a profound impact on academia, where students and faculty are encouraged to question and research sometimes controversial ideas. For example, investigation into a student's private and campus life also includes records of academic research, psychological counseling notes and records, and medical history and treatment, including abortion. Overriding privacy acts in the health and educational fields, students and even faculty are no longer promised protection from prying eyes. Further, political advocacy groups and non-citizens may face criminal action, be fined, or not be allowed to return to the United States based on suspicion without probable cause. For intelligence gathering purposes, this logic can deem every member of the public as suspicious if they are considered unpatriotic.

While the attacks of September 11 demonstrated a need to improve the efficiency and effectiveness of surveillance measures, there is no indication that the current surveillance techniques cannot simply be increased or enhanced without radically altering the confines of the existing laws addressing terrorist threats (Racklow, 2002). Originally, the Foreign Intelligence Surveillance Act (FISA) of 1978 allowed federal agents to conduct physical and electronic surveillance of "foreign intelligence information" between foreign states or areas under U.S. control (U.S. Code, 2006). The act defined lax federal powers to conduct sweeps on both international agents and foreign governments. Additionally, a special court was created, in which the members met in secret to approve of or deny search warrants to federal agents with probable cause. However, FISA did not specifically include investigations into terrorist activities that were not directly affiliated with a foreign state. Consequently, the Patriot Act of 2001 amended FISA to include investigations of suspicious persons whose international affiliation or lack thereof was undefined or nonexistent (U.S. Code).

Instead of addressing whether FISA was adequate to combat new terrorist activities, the Bush administration strategically played upon the tragedies of September 11 to pass the new provisions. These provisions would provide the government with surveillance authority that far surpassed their needs. Senator Orrin Hatch (R-Utah), an advocate of the Patriot Act, stated, "I do not think we should expand the wiretap laws any further. We must ensure that in our responses to recent terrorist acts, we

do not destroy the freedoms that we cherish” (U.S.Code). The task of protecting the public from terrorist attacks is indeed more challenging in the wake of the terrorist acts of September 11. Our constitutional rights, however, should be of no less importance to both the federal government and ourselves, regardless of whether it is a time of war or a time of peace.

The Culture of Surveillance: Specter and Reality

Consider that the purpose of educational and healthcare privacy acts is to create a legal boundary in which the individual is protected against random or misguided investigation. Standard criminal procedures bar law enforcement officials from applying criminal laws without due process. Individuals under investigation for criminal activities still maintain their constitutional rights; this cannot be bypassed even during initial police contact, arrest, investigation, or court trials and appeals (ACLU, 2001). Amendments IV, V, VI and VIII all guarantee an individual’s basic civil rights, even while under investigation by law enforcement agencies. Specifically, Amendment IV of the Constitution states that the people’s right

. . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (Davies, 1999, p. 547).

Most importantly, the Fourth Amendment applies specifically to criminal, and not civil, cases as defined by the Supreme Court in the *Murray v. Hoboken Land Decision* (Davies). By amending FISA through the Patriot Act, the government bypassed this basic tenet of civil liberties.

Further, there is little if any safeguard for persons who are unduly searched and seized; the Patriot Act effectively releases any government or law enforcement agency from the mandatory standard of due cause and from obtaining warrants to investigate people for potential unlawful activities. This creates real and potential implications for many academic communities with a history of inquiry and protest to protect and understand life outside the mainstream. As previously discussed, the immanence of a surveillance culture places people with counterculture beliefs, or who claim minority, religious or ethnic status in the position of being more easily targeted with suspicion.

Given these additional powers placed in the hands of local and federal agencies, the issues of race and ethnicity become even more wrought with tension. Arab-Americans were self-described as the hidden people of color before September 11 (Cainkar, 2002). Their communities are now placed under additional scrutiny based on racial and cultural differences (Cainkar). Racial profiling, according to David Harris, author of *Profiles in Injustice*, uses “race or ethnic appearance as a broad indicator of who is involved in a crime or terrorism” (Hassan, 2002, 17). As a *de facto* policy, racial profiling dismisses the legal principles of *innocent until proven guilty* (for criminal trials) and *preponderance of evidence* (for civil trials). Instead, racial profiling relies on probable cause, reasonable suspicion and perhaps most importantly “compelling interest” to justify arbitrary interrogations and detentions (Hassan).

Specifically, persons of Arab descent and/or Muslim affiliation are placed under additional threat of racial and cultural profiling. While persons from other ethnic groups, such as African-Americans and Latin-Americans, have been harassed and questioned by law enforcement officers, the implication is that they were mistakenly assumed to be of Arab descent. In a 2000 presidential debate, Governor Bush responded to a question on race with the following: “I can’t imagine what it would be like to be singled out because of race and harassed. That’s just flat wrong . . . I do think we need to find out

where racial profiling occurs and say to the local folks, get it done and if you can't, there'll be a federal consequence" (Feldman, 2002). With the advent of the Patriot Act, federal and local law enforcement agencies now have undue license to target individuals because they look like or are of Middle-Eastern descent.

The great irony of this situation is that the Patriot Act serves to further divide American society and exacerbate irrational fear. For example, profiling of Arabs and Arab-Americans at U.S. airports, including special security checks and removal from airplanes, has dampened their desire to travel both domestically and abroad (Feldman). In February of 2002, the magazine *Arab-American Business* provided special safety tips for Arab-American travelers in a sidebar to an article titled "Flying While Arab" (Cainkar). The trouble with these policies is that they target millions of innocent people solely on the basis of religion, country of birth, and ethnicity. The fingerprinting and registry initiative announced on August 12, 2002, for persons from select Arab and Muslim nations is only the latest in a string of actions targeting Muslim and Arab communities, which began with the detention of nearly 1,200 citizens and non-citizens, mostly of Middle-Eastern descent, after September 11 (Hassan). Ironically, one of the earliest victims of these fears was Muhammad Salmab Hamdani, a paramedic who gave his life to save his fellow citizens who were victims of the September 11 attacks. The media labeled Hamdani as an agent who aided and abetted terrorists, based on racial profiling and discrimination, and only months later did extensive DNA evidence correctly identify him as an everyday man who died a local hero assisting others. Although the media retracted their claims of Hamdani's alleged terrorist association, the libel damaging his reputation was irreparable (al-Hibri, 2003-2004).

Zoning In: Targeting International, Multi-Cultural Students & Faculty:

International and legal minority students and faculty constitute a valuable sector of higher education in the United States. Especially among the physical sciences and mathematics departments, it is reported that at least one-third of the faculty is foreign born (AAUP). Students of Middle Eastern descent are placed under increased risk of being targeted by authorities based primarily on race and ethnicity and threatened with suspicion of terrorist activities (Information Resources, 2004). For example, two Russian students at the University of Texas were riding their bicycles to the local gym and stopped at a parking lot to ask for directions; they were arrested for criminal trespass on the suspicion of being "Pakistani" terrorists. Once it was clear they were both actually Russian students with legal visas, they were released on bail. Ironically, the charges were not immediately dropped by the authorities (Information Resources). The police continued to aver they were "following the direction of federal authorities" (Ridgeway, 2003, 1).

Standard police procedures, such as informing the students why they were being held or questioned, making a formal arrest, reading them their Miranda rights, and more importantly, providing adequate representation and counsel, were not followed nor deemed appropriate procedures, which is ironic given that law enforcement officials are required to obtain adequate evidence before issuing formal charges. With no evidence but with a clear case of mistaken identity, it is reasonable to ask why biking to a gym that is open to students with identification is considered a criminal trespass. Further, the local and federal law enforcement officials bypassed formal legal procedures by continuing to press criminal charges in light of no evidence or probable cause.

The requirements for tracking overseas students, including long delays in processing visas, have had the most direct impact on academic institutions, resulting in reduced applications and enrollments for international students (Warwick, 2005, 593). For some international students, compromised privacy is perhaps all too familiar. Omar Afzal, the advisor to the Muslim student group at Cornell University,

has been counseling students on what to do if an agent shows up to ask them questions: “Contact the international students’ office or elders in the community and be polite and straightforward,” he says; “They are terrified,” he adds. “They come from a culture where if a policeman shows up at the door, you are being targeted to be sent to prison for a long time” (Carlson & Foster, 2002, A1).

College and university librarians face difficulty adhering to the Patriot Act at work. Library policies are typically designed to protect the privacy of their patrons, and librarians themselves have traditionally been staunch advocates of privacy rights. “It is not just a policy: It is an ideology, almost a religion,” says Ross Atkinson, Cornell’s deputy university librarian (Carlson & Foster, A1). He and other librarians worry that the government will use the Patriot Act to investigate what patrons read, research and check out of the libraries. Miriam Nesbit, the legislative counsel for the American Library Association, states that the Patriot Act gives law enforcement agencies access to business records, which may also include patron records. In the age of expanding technologies, this grows even more complicated. For example, to protect privacy, libraries try not to keep information; most libraries now destroy records of book loans after the book is returned (Carlson & Foster).

The law stretches the legal boundaries for prying into electronic communications. For example, one provision prohibits colleges from disclosing that federal agents have sought “business records,” which some officials state may include library records, to investigate people linked with hostile foreign governments (Carlson & Foster, 2002). The difficulty of understanding the Patriot Act is that it reduces a variety of privacy protections. As previously stated, the Patriot Act is a patchwork of amendments to such laws as the Family Educational Rights and Privacy Act, which governs students’ privacy rights; the Foreign Intelligence Surveillance Act (FISA), which authorizes the federal government to spy on suspected foreign agents; and the Electronic Communications Act, which limits the disclosure of electronic communications (Carlson & Foster).

“Universities uphold the importance of free inquiry, and we don’t want to chill that inquiry by having researchers and students think that their every move is being tracked by the government,” says Peter P. Swire, law professor at Ohio State University and former Clinton advisor on privacy issues (Carlson & Foster, A1). However, law enforcement officials must balance this with the fear that universities may become a safe haven for terrorist activity. However, he stated, “There is a very strong feeling that we need to protect privacy more than ever” (Carlson & Foster, A1). With a cold shoulder to both diversity and academic freedom, the Patriot Act smacks of the McCarthy era and threatens to undermine not just civil liberties supposedly guaranteed by the Constitution, but also to quash freedom of political and intellectual thought, speech and activism, which keep the public alert and abreast of the threat of a police state.

Moving Targets or Members of Our Academic Communities?

The increase in racial tension due to profiling is not just a phenomenon observed on the streets or college campuses. Even K-12 classrooms have become the target of ethnic tension, and educators have come under fire for obstruction of patriotism. Hate crimes and politics based on fear have promoted intolerance, and the classroom is the proving ground of American patriotism for students and teachers alike. Healthy debates and lessons, including open criticisms of ethnic and cultural profiling, of racial tensions and post-September 11 laws, have come under fire by school administrations and parents alike.

The notion of patriotism in the classroom and on campus grounds has become more obscure and politicized in a return to traditional American values that were previously abandoned in the hubbub of multiculturalism. The K-12 school grounds are at risk for becoming the breeding grounds of

isolationism and undue hatred, just as institutions of higher education are vulnerable. In New Mexico, five high school teachers were suspended without pay for promoting open discussion of U.S. involvement in the Iraq War and allowing students to express anti-war sentiments (Westheimer, 2004). Alan Cooper, a teacher hailing from Albuquerque, New Mexico, was suspended for refusing to remove students' posters after his principal stated that they were "not sufficiently pro-war" (Westheimer). Of course, when one notes that the U.S. school system promotes military recruitment with advertising that targets students, open, frank discussions of military involvement, diversity and race would be threatening to current school administrations.

The controversy over patriotism and politics and whether or not politics should be included in civic education is closely related to the current problems of racial and cultural profiling suffered by Arab- or Muslim-Americans today. Decreasing student and public awareness of the potential threat of the police state or "Big Brother" government will lead to ignorance of civil rights and liberties, increased racial profiling, and hate crimes. This is not the first time a subgroup of American society was unduly targeted and made to be the subject of discrimination and hatred. Yet, we should ask ourselves whether this will be the last period of American history to commit these depredations. Teaching the values of American patriotism ethically should not involve targeting other individuals for not fitting with a regime's specific profile of Americana.

When unpopular ideas such as activism against racial and cultural profiling or antiwar criticism arise, the civic-minded public should question why we assume these ideas to be unpopular, and what constitutes popular patriotism. Patriotism and politics often run their course on divergent paths in the American education system. Parallel to the mainstream public's often black-and-white interpretations of policies, White House insiders, Congress, and law enforcement agencies may either follow along with public opinion, or worse, manipulate it to exact control over potential, knowledgeable political adversaries. The Patriot Act serves as an excellent example of manipulating public fear and weakening civil liberties to "be on top" of the political game.

Therefore, we should question why the public is not privy to the same sphere of political involvement. A divided public, suspicious even of our peers, whether in school, on campus, or as part of general community, serves no one. Unfounded suspicion and paranoia also serve unchecked government agents and officials who wish to bypass our civil rights and liberties and generate divisive fear. We cannot govern ourselves or assist others effectively and fairly if we become a police state with little regard or respect for individual, racial and cultural differences.

Denigration of our civil liberties post-September 11 and the negative effects of racial and religious profiling have also raised awareness about existing and increasing discriminatory abuses, religious and cultural education. On a local level, there appears to be a marked increase in public education about Islam, largely sponsored by local non-profit organizations. Recently, in a major initiative supported by the Chicago Community Trust, the Chicago public school system is studying ways to reform its curriculum to include Arabs, Islam and broader treatments of the Middle East (Carlson & Foster). Arabs and Muslims are also being invited to speak at public forums, to engage in dialogue and to "sit at the table." On a more personal level, many Muslim-American organizations are reporting that the vast majority are experiencing special caring, kindness and often protection from persons outside their communities in the past year, despite the overall negative climate (Carlson & Foster).

These events reflect the paradox of the times: Repression and inclusion struggle to occur at the same time. However, the plethora of new restrictions which zero in on Arabs and Muslims in the media and popular culture tell a much less encouraging story. The Arab and Muslim communities are no longer invisible in the United States, and neither are the ethnic and racial ugliness aimed toward them (Carlson & Foster).

Conclusion:

The Patriot Act disregards many of the constitutional liberties provided by the Bill of Rights and has the potential for racial and ethnic profiling. It also invokes neo-McCarthyism, ignoring basic civil and political rights of the people for the “greater good.” The problem is that there are different definitions and understandings of this greater good; if we ignore the basic values that are the foundation of our Constitution, our legal system and civil society, we lose our voice as a multicultural and multi-political nation. We ignore our right to be different; to look, think and exist in a culture of differences where each in turn shares ideas and learns from one another. In a sea of differences is a wealth of ideas, ethical richness, and acceptance; this is a vital part of an academic community that embraces faculty and students of different cultures and creeds. The Patriot Act does not serve as a reminder of the nation’s need to look for terrorists in the classroom; rather, it serves as a reminder of hysteria and a rush to judgment. It serves to question how patriotic we are when we should ask ourselves as both citizens and visitors, how we respect each other. Looking, sounding or speaking differently should not be something to be feared; it should be accepted as part of America’s heritage.

References

- al-Hibri, A. (2003-2004). Symposium: American Muslims and civil rights: Testimonies and critiques, opening remarks. *Journal of Law and Religion*, 19, 59 – 62.
- American Association of University Professors. (2003). Academic freedom and national security in a time of crisis. Report of the AAUP Special Committee on Academic Freedom and National Security.
- American Civil Liberties Union. (2001). How the anti-terrorism bill puts student privacy at risk. <http://www.aclu.org/natsec/emergpowers/12479leg0011023.html>.
- American Civil Liberties Union (2003). How the Patriot Act 2 would further erode the basic checks on government power that keep America safe and free. <http://www.aclu.org/safefree/general/17346leg200330320.html>.
- Cainkar, L. (2002). No longer invisible: Arab and Muslim exclusion after September 11. *Middle East Report*, 224, 22-29.
- Carlson, S. and Foster, A. L. (2002). Colleges fear anti-terrorist laws could turn them into big brother: Provisions about networks and library records raise privacy and academic-freedom issues. *Chronicle of Higher Education*, March 1.
- Davies, T. Y. (1999). Recovering the original Fourth Amendment. *Michigan Law Review*, 98, 547.
- Diffie, W. and Landau, S. (1998). *Privacy on the line: The politics of wiretapping and encryption*. Cambridge MA: The MIT Press.
- Feldman, K. (2002). American justice, Ashcroft style. *Middle East Report*, 224, 30-31.
- Hassan, S. D. (2002). Arabs and the post-September 11 national security state. *Middle East Report*, 224, 16-21.
- Information resources: The USA Patriot Act. (2004). *Problems of Post-Communism*, 51, 3 – 65.

Muller, B. J. (2008). Securing the political imagination: Popular culture, the security dispositif and the biometric state. *Security Dialogue*, 39, 199-220.

Racklow, S. (2002). How the USA Patriot Act will permit government infringement upon the privacy of Americans in the of “intelligent” investigations. *University of Pennsylvania Law Review*, 150, 1651-1669.

Ridgeway, J. (2003). The tip-off: Bikes. *Village Voice*, October 22-2.

Stubbs, J. K. (2003-2004). The bottom rung of America’s race ladder: After the attacks of September 11 are American Muslims becoming America’s new n . . .s? *Journal of Law and Religion*, 19, 115-151.

U.S.A. PATRIOT ACT. (2001). Pub. L. No. 107-56, § 102, 115 Stat. 272.

U. S. Code Collection. (2006). Foreign intelligence surveillance. U.S. Code, Title 50, Chapter 36. Cornell Law School. http://www.law.cornell.edu/uscode/html/uscode50/usc_sup_01_50_10_36.html.

U. S. Department of Justice, Patriot Act Website. www.lifeandliberty.gov.

Warwick, S. (2005). Will the academy survive 9/11? Scholarship, security, and United States government policy. *Government Information Quarterly*, 22, 573-593.

Westheimer, J. (2004). Introduction—The politics of civic education. *PSOnline*, American Political Science Association. www.apsanet.org.

Zeljak, C. (2004). Information resources: The USA Patriot Act. *Problems of post-Communism*, 51, 63-65.